

Town of Amherst
Zoning Board of Appeals

SPECIAL PERMIT

The Amherst Zoning Board of Appeals hereby grants a Special Permit, ZBA FY2011-00020, to allow accessory live music, on an outdoor dining terrace from 6:00 p.m. to 9:00 p.m., under Section 5.042 of the Zoning Bylaw, at 51 East Pleasant Street (Map 11C, Parcel 267, B-G Zoning District, MPD, DR overlay district), with the following conditions:

1. This permit shall expire on June 30, 2012.
2. The hours of operation for any outdoor live music shall not occur before 6:00 p.m. or extend later than 9:00 p.m., seven (7) days per week.
3. Live music shall not be offered from November 1 to April 1.
4. The number of musicians shall be limited to a maximum of four (4) and they shall perform only in the designated area as shown on the approved floor plans, stamped approved on May 26, 2011. The location of any musicians shall not impede the access to proper means of egress out of the building or off the patio.
5. Sound produced by live entertainment shall not generally exceed 70 dB (A) as measured at any boundary of the property on which the establishment is located, pursuant to Section 5.0421 of the Zoning Bylaw.
6. Any/all amplification shall be positioned so that it is not directed to the west - toward Kendrick Park.

Tom Simpson, Chair
Amherst Zoning Board of Appeals

DATE

Town of Amherst
Zoning Board of Appeals - Special Permit

DECISION

Applicant: Bertucci's c/o Bob Womboldt

Property owner: Central Amherst Realty Trust
21 East Main Street, Westborough, MA 01581

Date application filed with the Town Clerk: May 5, 2011

Nature of request: For a Special Permit to allow for accessory live music, on an outdoor dining terrace, from 6 p.m. to 9 p.m. under Section 5.042 of the Zoning Bylaw

Address: 51 East Pleasant Street (Map 11C, Parcel 267, B-G Zoning District, MPD, DR overlay district)

Legal notice: Published on May 11, 2011 and May 18, 2011 in the Daily Hampshire Gazette and sent to abutters on May 10, 2011

Board members: Tom Simpson, Eric Beal, Tom Ehrgood

Submissions:

- Project Application Report, dated May 20, 2011.
- ZBA application form, filed with Town Clerk on May 5, 2011
- Letter/Management Plan, dated April 27, 2011
- Floor Plan showing the outdoor dining terrace
- Email & photograph of decibel reading with stereo, dated May 18, 2011

Submitted by Town staff

- ZBA FY1992-72 – for the Class II restaurant
- ZBA FY1995-54 – to allow for outdoor dining under Section 5.041
- Existing conditions photographs (showing the outdoor dining terrace)
- Town GIS map showing zoning
- An email from Christine Brestrup, Senior Planner, regarding Kendrick Park
- A decibel loudness comparison table.

Site Visit: May 23, 2011

Tom Simpson, Eric Beal, and Tom Ehrgood viewed the site. The following was observed:

- The location of the outdoor dining terrace along the west side of the building and adjacent to East Pleasant Street.
- The approximate location, along the south edge of the patio, where musicians would be located.
- The approximate location of the north property and west property lines on the outside edge of the existing brick patio walls.

Public Hearing: May 26, 2011

The applicant, Bob Womboldt, presented the application. His statements are summarized as follows:

- He is a Managing Partner at Bertucci's, and he is seeking a Special Permit to allow musicians to play light live music from 6:00 p.m. to 9:00 p.m. on the outdoor patio area adjacent to East Pleasant Street.
- The type of music will vary depending on the type of musicians, but it will most likely be a mix of unamplified acoustic music and amplified music. He has been calling it a "starving musician program".
- A decibel meter was used to determine that a radio with the volume turned to the maximum setting produced a dB (A) reading of approximately 65 decibels standing on the walkway adjacent to East Pleasant Street. The reading was taken about eight (8) feet from where the musicians would be performing. Due to the recent weather – and trouble borrowing the decibel meter - he was unable to test an amplified instrument.
- The sound level of the live music will comply with the limit of 70 dB (A) at any property boundary.
- The purpose of the live music is to provide for light entertainment to those dining on the patio. He does not want this to be a rock concert or to attract a large rowdy crowd.
- The musicians will be located at the south side of the patio.
- The restaurant and patio are adjacent to a busy street, other commercial properties, and directly across from Kendrick Park.

In response to a question from Mr. Ehrgood, it was confirmed that a Special Permit is required under Section 5.042 because the proposal is accessory to a principal use - a Class II restaurant - which is subject to a Special Permit. Mr. Bagg noted that the Town GIS map shows that there are no residential dwellings within 150 feet from the establishment.

Mr. Bagg stated that the design concepts for Kendrick Park are still under consideration. However, an email from Christine Brestrup, Senior Planner, states that the level of the music at the property line and the limited hours, will not negatively impact the existing or future use of Kendrick Park.

In response to a question from Mr. Beal, the location of the most relevant property line is immediately to the west of the existing brick wall which frames the outdoor dining terrace.

Mr. Beal noted that both of the previous Special Permits, ZBA FY1992 - 72 for the Class II restaurant and ZBA FY1995-54 for the accessory outdoor dining, contained conditions that prohibited speakers on the west patio.

James David, 77 Crescent Street, Greenfield, stated that he owns the adjacent undeveloped parcel to the north. He expressed concern that the noise could disturb future users of the site. He requested that the Board require additional information regarding the sound levels of the music.

Mr. Beal MOVED to close the evidentiary portion of the public hearing. Mr. Simpson seconded the motion and the Board VOTED unanimously to close the public hearing.

Public Meeting:

The Board noted that under Section 5.0422, the Zoning Board may impose a probationary period and/or additional testing, or other conditions as needed.

The Board members discussed the types of conditions that may be placed on the permit to ensure that sound level requirements are being met, such as requiring the permit be reviewed if the adjacent parcel is developed; requiring additional decibel level testing; or expiration after a certain time period.

Mr. Bagg expressed concern with applying conditions based on an impact to a potential future development because it isn't possible to identify an impact on a use that does not exist. He stated that requiring a review when the adjacent parcel is developed is challenging because the permit is only connected to the subject property, not to an adjacent property. He noted that because enforcement of the Zoning Bylaw is complaint driven, the adjacent property owner would have recourse by complaining of a violation when the adjacent property has been developed.

Specific Findings:

The Board found under Section 5.042 of the Zoning Bylaw, for live entertainment, that:

5.0420 - *Such entertainment shall be clearly accessory and incidental to the principal use.* The restricted hours, from 6:00 p.m. to 9:00 p.m., and the limited number of musicians illustrates that the live entertainment is incidental to the principal use.

5.0421 - *Sound produced by the proposed entertainment shall not generally exceed 70 dB (A) as measured at any boundary of the property on which the establishment is located, as determined by the regulations adopted pursuant to Section 5.0422.* The permit requires that this noise level not exceed the 70 dB (A) at the property line.

The Board found under Section 10.38 of the Zoning Bylaw, Specific Findings required of all Special Permits, that:

10.380 and 10.381 - *The proposal is suitably located in the neighborhood in which it is proposed; and, the proposal is compatible with existing Uses and other Uses by right in the same District.*

The property is located within the General Business Zoning District (B-G) where the use is allowed by Special Permit. The proposal is consistent with the other commercial uses in the area, such as Copy Cat, The Spoke, Dairymart, and Primo Pizza.

10.382 - *The proposal will not constitute a nuisance due to air and water pollution, flood, noise, odor, dust, vibration, lights, or visually offensive structures or site features.* The proposal includes conditions which limit the number of musicians; the orientation of any amplification equipment; and, the hours of operation for the music and the seasons during which the use can occur.

Additionally, because allowing live music outside is a new use to be regulated under a Special Permit, the permit is conditioned to expire in one (1) year.

10.383 & 10.385 & 10.387 - *The proposal will not be a substantial inconvenience or hazard to abutters, vehicles or pedestrians; reasonably protects the adjoining premise from detrimental uses; and, provides convenient and safe vehicular and pedestrian movement within the site and adjacent property.* The permit includes conditions that limit the sound to 70 dB (A) at any property boundary in accordance with Section 5.0422 of the Zoning Bylaw. Additionally, according to the applicant's testimony, the music will not overwhelm those who are dining on the terrace.

The Board noted that the limit of 70 dB (A) "generally" was important because, for example the last note of a song could go over the 70 dB (A) while still meeting the intent of the Bylaw. However, consistent or constant levels over 70 dB (A) would be in violation of Section 5.0422.

10.384 & 10.388 - *Adequate and appropriate facilities will be provided for the proper operation of the proposed use; and, ensures adequate space for the off-street loading and unloading of vehicles, goods, products.* The proposal will utilize the existing outdoor dining terrace/patio and does not require any other change to the site. The outdoor dining terrace is large enough to comfortably fit musicians and patrons while maintaining proper means of egress from the building and patio area.

10.393 - *The proposal provides protection of adjacent properties by minimizing the intrusion of lighting, including parking lot and exterior lighting, through use of cut-off luminaires, light shields, lowered height of light poles, screening, or similar solutions.* There are no changes to the existing lighting proposed or required for the use.

10.398 – *The proposal is in harmony with the general purpose and intent of the Zoning Bylaw because it enhances the quality of life in a village center.* The proposal is suitably located within the General Business Zoning District and is compatible with the other commercial uses in the area. The proposal contributes to the Land Use goal of the Master Plan to encourage economic development and a “sustainable, attractive town with a vital downtown and viable mixed-use village centers well connected to livable and diverse neighborhoods”.

Public Meeting – Zoning Board Decision

Mr. Simpson moved to APPROVE the application with conditions. Mr. Ehrgood seconded the motion.

For all of the reasons stated above, the Board VOTED unanimously to grant a Special Permit, ZBA FY2011-00020, to allow accessory live music, on an outdoor dining terrace from 6:00 p.m. to 9:00 p.m., under Section 5.042 of the Zoning Bylaw, at 51 East Pleasant Street (Map 11C, Parcel 267, B-G Zoning District, MPD, DR overlay district), with conditions.

TOM SIMPSON

ERIC BEAL

TOM EHRCOOD

FILED THIS _____ day of _____, 2011 at _____,
in the office of the Amherst Town Clerk _____.

TWENTY-DAY APPEAL period expires, _____ 2011.

NOTICE OF DECISION mailed this _____ day of _____, 2011
to the attached list of addresses by _____, for the Board.

NOTICE OF PERMIT or Variance filed this _____ day of _____, 2011,
in the Hampshire County Registry of Deeds.